

COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MONCTON

Citation: 2013 NBQB 346

M/C/663/13

Date: October 21, 2013

BETWEEN:

SWN RESOURCES CANADA INC.,

Plaintiff/Applicant,

- and -

**LORAINÉ CLAIRE, JIM PICTOU, STEVEN
BERNARD, JASON OKAY, GREG COOK,
WILHELMINA ("WILLI") NOLAN, MELANIE
ELWARD, ANN POHL, RACHEL DAIGLE,
SUZANNE PATLES, JOHN DOE AND JANE DOE,**
Defendants/Respondents,

- and -

PROVINCE OF NEW BRUNSWICK,
Intervenor,



DECISION

BEFORE:

Mr. Justice George S. Rideout

AT:

Moncton, New Brunswick

DATE OF HEARING:

October 18th, 2013

DATE OF DECISION:

October 21st, 2013

APPEARANCES:

Matthew T. Hayes, on behalf of the Plaintiff/Applicant

Richard A. Williams, on behalf of the Intervenor
Denis Thériault, on behalf of the Intervenor

RIDEOUT, J.

[1] This Court had rendered two written decision on this matter, the first granting an Injunction (2013 NBQB 328) and the second extending the Injunction (2013 NBQB 342). In the second decision, I granted service of the Injunction by substituted service by publication. The evidence before the Court establishes that this Order has been complied with by the Applicant. The hearing on October 18th, 2013, was to consider again the extension of the Injunction. At the conclusion of the hearing, I advised that I would be filing written reasons on Monday. Any interested party could give their name and address and I would cause a copy to be sent to them.

[2] The first issue to be dealt with was the issue of the Province of New Brunswick's request to be added as an Intervenor. The Province filed two Affidavits; one by Bill Breckenridge sworn to on October 17, 2013 and one by Dale A. Forster sworn to on the same date. I will set out both Affidavits:

I, Bill Breckenridge, of Fredericton, New Brunswick MAKE OATH AND SWEAR AS FOLLOWS:

1. I have personal knowledge of the matters deposed to herein, except as otherwise stated.

2. I am employed as Executive Director, Business Development and Community Relations, Department of Energy and Mines (hereafter "DEM"), Province of New Brunswick.

3. I am authorized to make this affidavit

4. I am informed by Keith Endresen, Director of the Resource, Exploration and Development Branch, DEM, and do believe, that SWN Resources Canada, Inc. (hereafter "SWN") is the holder of 32 licenses to search for Natural gas in New Brunswick. The licenses were issued on March 17, 2010 to SWN's parent company,

Southwest Energy Company, through a public tender process. In 2012, the licenses were extended until March 16, 2015.

5. In early 2013, pursuant to the provincial "Duty to Consult Policy", SWN submitted its proposed 2013 2D seismic program to the New Brunswick Aboriginal Affairs Secretariat (hereafter "AAS"). The purpose of doing so was to seek a determination as to the level of consultation with New Brunswick First Nations that would be required in the circumstances.

6. AAS issued a "Final Determination on the Duty to Consult" to SWN in May of 2013, which stated that the 2013 2D Seismic Operational Plan would have a negligible adverse impact on the Aboriginal use of the project area for traditional purposes, with a low risk of potential infringement upon Aboriginal and treaty rights. Attached hereto as Exhibit "A" is a copy of the "Final Determination on the Duty to Consult".

I, Dale A. Forster, Chief Highway Engineer, of Fredericton, New Brunswick MAKE OATH AND SWEAR AS FOLLOWS:

1. I have personal knowledge of the matters deposed to herein, except where otherwise stated.

2. I am employed as the Chief Highway Engineer and Assistant Deputy Minister, Department of Transportation and infrastructure, Province of New Brunswick (the "Province"), the Intended Intervenor.

3. I am authorized to make this affidavit.

4. New Brunswick Highway Route 134 is a designated highway under the administration and control of the Province. Attached hereto as Exhibit "A" is the relevant portion of a document filed in the property Registry pursuant to Subsection 15(1) of the Highway Act, being a "Notice of Highway Designation".

5. On September 30, 2013, various individuals blocked access to a staging area used by SWN Resources Canada to park its exploration vehicles and equipment. The staging area is located immediately adjacent to Route 134 at or near Rexton, New Brunswick. The blockade subsequently progressed to a blockage of Route 134 itself.

6. By virtue of its administration and control of New Brunswick Highway Route 134, the Province believes that it has a legitimate interest in seeking to intervene in the present matter in that the interests of the Province and of the travelling public may be affected by Orders made herein.

7. I make this affidavit in support of the relief claimed in the Province's Notice of Motion, dated October 17, 2013.

ISSUE

- [3] Should the Province of New Brunswick be added as a party?

ANALYSIS

- [4] Rule 15 of the Rules of Court provide in part:

15.02 Leave to Intervene as Added Party

- (1) Where a person who is not a party claims
- (a) an interest in the subject matter of a proceeding,
 - (b) that he may be adversely affected by a judgment in a proceeding, or
 - (c) that there exists between him and one or more of the parties a question of law or fact in common with a question in issue in a proceeding, he may apply to the court by notice of motion for leave to Intervene as an added party.
- (2) On a motion under paragraph (1), the court shall consider whether or not the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as to pleadings, production and discovery and impose such conditions as to costs or otherwise as may be just.

- [5] In *Halpen v. Toronto* [2002] O.J. No. 4514 considers a similar rule to New Brunswick's Rule 15 at paragraphs 13 and 14:

13 As EGALE is seeking added party status under rule 13.01(1), I begin with the criteria set out in that rule, which permit a party to move for leave to intervene if the party claims any one of the following:

- (a) an interest in the subject matter of the proceeding;
- (b) that the person may be adversely affected by a judgment in the proceeding; or
- (c) that there exists between the person and one or more of the parties, to the proceeding a question of law or fact in

common with one or more of the questions in issue in the proceeding.

[Emphasis added]

14 If the moving party establishes that it meets any of these criteria, the court must then consider, under rule 13.01(2), "whether the intervention will unduly delay or prejudice the determination of the rights of the parties". If the court is satisfied that any such delay or prejudice will not be undue, it may then exercise its discretion to add the party "and may make such order as is just". Such an order will usually specify conditions of added party status.

[6] In *Allsco Building Product Ltd. v. United Food and Commercial Workers International Union, Local 1288* [1998] N.B.J. No. 527, the **New Brunswick Court of Appeal** stated at paragraphs 6 and 7:

6 Nowhere in Rule 15.02 is there an indication that the interest in the subject matter of the proceeding must be a direct interest. I think that Mr. Justice Stevenson's finding in this regard is too narrow. I hold that the interest in the subject matter can also be an indirect interest. Since the matter of granting intervention is discretionary I would not confine the discretion of a superior court judge in deciding whether to grant status to an applicant as an added party. When the interest of the applicant in the subject matter of the proceeding is a direct interest a court may well be persuaded to grant intervention; an indirect interest may be less persuasive unless supported by a secondary argument such as assistance in resolving the issues in the proceeding. I would therefore expand the position taken by Stevenson J. in *Morgentaler*.

7 Again, Rule 15.02 does not deal with the finding of Stevenson J. that, absent an interest in the subject matter, intervention may be granted when it will result in evidence or argument that will assist the court in resolving issues in the proceeding and that such evidence will not be available to the court if the intervention is not permitted. His finding in this regard comes from precedent and makes eminently good sense in relation to the exercise of a judicial discretion; particularly where public interest bodies apply or Charter issues are raised. See for example, *R. v. Finta*, [1993] 1 S.C.R. 1138 per McLachlin J. at paras. 5 and 6 where rule 18 of the Rules of the Supreme Court of Canada is shown to be broader than our rule; *Adler v. Ontario* (1992), 88 D.L.R. (4th) 632 (Ont. Gen. Div.) per Anderson J. at 636-637; *Re Schofield and Minister of Consumer and Commercial Relations* (1980), 112 D.L.R. (3d) 132 per Thorson J.A. in his separate concurring judgment for the majority at 141.

[7] The Province's request to be granted Intervenor status is somewhat unusual in that this arguably is a private matter. However, public roadways are involved and the Applicant is proceeding on the basis that the Province has given SWN certain rights.

[8] Two Federal Court decisions have considered when it is appropriate for the Attorney General to intervene; Vancouver Wharves Ltd. v. Canada 1996 CarswellNat 164 and Energy Probe v. Atomic Energy Control Board 1984 CarswellNat 806. Each case must be decided on its own facts but where public policy may be in dispute, the view of the Attorney General or others may be of value.

[9] Counsel for the Province referenced R.A.C.S. [1969] 4 C.C.C. 284 at paragraphs 19 and 20:

19 But is this case not a matter of public interest? Public interest does not mean something in which the public is interested, for the public may be interested in any number of sensational matters which do not concern it. Public interest means something in which the public has some vital interest which affects the public in either a pecuniary or personal sense.

20 As Lord Chief Justice Campbell said in Regina v. Bedfordshire (Inhabitants) (1855), 4 E. & B. 535, 119 E.R. 196, 6 Cox C.C. 505, "the term 'interest' as used in the words public or general interest does not mean that which is interesting from gratifying curiosity or a love of information or amusement, but that in which a class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected."

[10] Considering the authorities cited, the consent of the Applicant and the information contained in the Affidavits set out above, I was satisfied that there was a public interest sufficient for the Province of New Brunswick to be granted

Intervenor status. In particular, there are issues of public roads, the obligation of the Province to consult with First Nations and the issue of the permissions granted to the Applicant by the Province. In my view, the addition of the Province will not delay matters.

- [11] Consequently, I have ordered that the Province of New Brunswick be granted Intervenor status as a party in the matter.

ISSUE

- [12] The next matter which the Court must deal with is the issue of whether the present Injunction Order should be continued.

ANALYSIS

- [13] The Applicant had previously requested an extension to the Injunctive Order which had been granted. The Court and many more are aware of what transpired on Thursday last. There were numerous news broadcasts showing what took place. The information presently before the Court is that the Applicant has removed its equipment from the site where it had been kept such that the Injunction in this respect, items (a) (b) (c) and (d) are no longer required. Essentially, the request to extend the Injunction is to limit the Injunction to the

Applicant's continuing operation being unimpeded by protests and road blockages.

- [14] During the hearing of the matter, I permitted a number of persons in attendance to speak to the Court. All were opposed to the Injunction and were worried about losing their "rights". I explained that I attempted to protect their rights in the Injunction Order but I am not certain they understood so I will set out again what I put in the Order:

AND IT IS FURTHER ORDERED that the Respondents are still to be permitted to voice their objections to the operations. They should be permitted limited signage. However, they cannot block the highways, roadways and entrances to the Applicant's operations. Provided further that nothing should preclude the parties from meeting or assembling to determine a course of action that they wish to take but they cannot do anything that in any way would block the roadways, entrances or highways or interfere with the Applicant's operations.

- [15] Clearly, nothing in the Injunction interferes with any person protesting nor does the Injunction interfere with the assembly of persons to plan a course of action. Certain Respondents seemed confused about this aspect of the Injunction.

- [16] Simply put, what has been requested by the Applicant is an extension of the Injunction such that its equipment can travel on the highway and roadways of the Province of New Brunswick and conduct any of the activities related to the seismic testing program, including the vehicles, equipment, persons engaged in those activities of the Applicant.

- [17] The information before the Court at this time is that all vehicles and equipment owned by SWN have been removed from the compound. The persons who were blocking the roadway have ceased those activities. It is not clear but protests continue in various locations but the evidence before the Court does not establish the activities to be unlawful or involve SWN Resources Canada Inc. and the Respondents.
- [18] Other protests may arise but it is my view that this Court ought not speculate as to what may happen and what steps the Court should take to prevent certain speculated activity.
- [19] All of which to say that at this time, I do not believe there is sufficient evidence before this Court which meets the R. J. R. MacDonald tests for granting an Injunction. Consequently, the present Injunction need not be continued.

DISPOSITION

[20] The Injunction Order issued October 3, 2013 and continued on October 11, 2013 is no longer in force or effect, effective immediately. Costs of these injunctive proceedings should be costs in the cause of action presently undertaken by the Applicant against the Respondents.

SIGNED this 21st day of October, 2013 at Moncton, New Brunswick.



George S. Rideout
Judge of the Court of Queen's Bench
Trial Division